Filed 1/11/19 Sameer v. Benett CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MADHU SAMEER,

Plaintiff and Appellant,

v.

SUSAN BENETT et al.,

Defendants and Respondents.

F071888

(Super. Ct. No. 15CECG00351)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Madhu Sameer, in pro. per., for Plaintiff and Appellant.

Burton & Cooper, John S. Burton; McCormick, Barstow, Sheppard, Wayte & Carruth, Gary A. Hunt; Whitney, Thompson & Jeffcoach and Marshall C. Whitney for Defendants and Respondents.

-ooOoo-

Plaintiff Madhu Sameer (Madhu) appeals from an order granting the anti-SLAPP motions[1] of three attorneys and a law firm. Madhu sued the lawyers based on alleged misconduct in connection with their representation of her ex-husband in a marriage dissolution proceeding.[2] That bitterly contested proceeding involved disputes over community assets, spousal support, and child support, and included allegations by the couple's two minor sons that their father sexually abused them.

The trial court granted the attorneys' anti-SLAPP motions on the ground that section 425.16 protected actions commenced, statements made, and pleadings submitted by the attorneys while representing their client in litigation. The trial court also determined Madhu had not met her burden of establishing a reasonable probability that she would prevail on one or more of her claims. (§ 425.16, subd. (b)(1).)

On appeal, Madhu contends the trial court erred in procedural rulings and in its determination of the merits of the anti-SLAPP motion. The procedural rulings relate to service of one of the anti-SLAPP motions, the court's denial of Madhu's motion requesting leave to file a first amended complaint, and the court's refusal to consider untimely oppositions to the anti-SLAPP motions. As to the merits of the anti-SLAPP motions, Madhu contends illegal conduct is not protected activity for purposes of section 425.16 and she properly alleged the attorneys engaged in illegal conduct. Thus, she concludes the attorneys failed to establish they engaged in protected activity.

Under the first step of the anti-SLAPP analysis, we conclude the conduct of the attorneys in connection with the marital dissolution and child support proceedings was protected under section 425.16. The exception that holds illegal conduct is not protected

---

[1]The acronym "SLAPP" stands for strategic lawsuit against public participation. An anti-SLAPP motion is the special motion to strike authorized by Code of Civil Procedure section 425.16 (section 425.16), California's anti-SLAPP statute.

[2]For clarity, we refer to plaintiff Madhu Sameer by her first name and to Sameer Khera as ex-husband.

by section 425.16 does not apply because (1) the attorneys have not conceded their conduct was illegal and (2) the asserted illegality is not shown conclusively by the evidence. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 317 (*Flatley*).) Thus, the attorneys have carried their burden of showing the claims against them arose from protected activity.

Under the second step of the anti-SLAPP analysis, we conclude Madhu has not established a reasonable probability of prevailing on her claims. Some of her causes of action, such as perjury, obstruction of justice and acts of moral turpitude, are not recognized under California law. Her other causes of action, with the exception of the malicious prosecution claim, are barred by the litigation privilege. The malicious prosecution claim lacks merit because the evidence shows as a matter of law that the marriage dissolution proceeding was filed with probable cause.

As to the various procedural rulings contested by Madhu, we conclude she has failed to establish a prejudicial abuse of discretion.

We therefore affirm the judgments.

FACTS

Parties

Susan L. Benett, Lewis M. Becker, the law firm of Benett & Becker, and Lenore Schreiber (collectively, Attorneys) are the respondents in this appeal and were among the defendants named in Madhu's complaint. They are attorneys who represented ex-husband in proceedings for dissolution of marriage and child support. Their successful anti-SLAPP motions are the subject of this appeal.

Marriage Dissolution Proceeding

Madhu and ex-husband were married in January 1986, had three children (born 1989, 1998 and 1999), and separated in 2003. In October 2003, ex-husband filed a marriage dissolution proceeding in Santa Clara Superior Court. The case was assigned No. 103FL116302.

Child Support Orders

In October 2003, Madhu filed a motion for child support and custody. In December 2003, the Santa Clara Superior Court filed an amended order after hearing directing ex-husband to pay $2,332 monthly in temporary child support and $1,535 monthly in temporary spousal support. The DissoMaster calculation attached to the order showed $12,250 was input as the ex-husband's monthly wages and salary and $500 was input as Madhu's. In February 2004, the court modified the support amounts slightly and also directed ex-husband to pay one-half of health and school expenses.

In May 2005, Madhu applied to the Fresno County Department of Child Support Services (DCSS) for child support services. In September 2005, DCSS opened a proceeding in Fresno Superior Court[3] and filed (1) a statement for registration of California support order; (2) a notice of registration of California support order; and (3) a notice regarding payment of support and substitution of payee. These documents directed ex-husband to pay all support obligations to the Fresno office of the DCSS.

On February 15, 2006, pursuant to a status-only judgment, the marriage of Madhu and ex-husband ended. Remaining issues included division of community property, child support, spousal support, and child custody and visitation.

In January 2008, DCSS filed a motion to modify ex-husband's child support obligations. DCSS filed this motion in Fresno Superior Court rather than in Santa Clara Superior Court—the court that had been dealing with disputes about the amount for child support since 2003. DCSS's supporting declaration stated ex-husband was employed by Cisco Systems, Inc., had monthly net disposable income of $35,571 and monthly taxable gross income of $62,580. Using these figures, DCSS calculated the guideline child support at $8,186 per month.

[3]The proceeding was assigned case No. 05CEFS02946.

On February 25, 2008, a judgment on reserved issues was filed in the Santa Clara Superior Court proceeding. The judgment stated it was entered pursuant to the parties' oral stipulation made in open court on May 18, 2007, and (1) addressed property division, (2) provided the method for calculating guideline child support, and (3) specified monthly spousal support in amounts that decreased every 12 months and ceased on June 1, 2010.[4] The judgment also stated that the pending contempt proceedings brought by the parties against each other were dismissed with prejudice.

Meanwhile, DCSS's January 2008 motion to modify child support proceeded very slowly. In June 2011, the Fresno Superior Court began the contested hearing on that motion. The testimonial phase of the hearing took two years to complete. In 2013, posthearing briefing on the motion was filed and the motion was submitted in November 2013. In February 2014, the court filed its ruling, which found changed circumstances and the best interests of the children justified deviating from guideline support to require a percentage of ex-husband's bonus and stock income to be paid as additional child support.

In September 2014, the Santa Clara Superior Court signed an order giving Madhu sole legal and physical custody of the two sons and stating she had the option of moving with the children to Australia or New Zealand. Previously, in January 2013, the children made allegations of domestic violence and sexual molestation against ex-husband, their father. In March 2013, the Santa Clara Superior Court issued an order (1) giving Madhu temporary sole legal and physical custody of the two minor children, (2) allowing ex-husband supervised visitation twice per month for up to 16 hours, and (3) directing ex-husband to have no other contact with the children.

---

[4]Madhu's motion to modify spousal support was denied in a May 2010 order of the Santa Clara Superior Court. (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1474.) In June 2012, the Sixth Appellate District affirmed that order. (*Id*. at p. 1486.)

In October 2014, Madhu filed a motion in Fresno Superior Court to enforce child support arrearages from 2003 through 2012, supported by declarations and a memorandum of points and authorities. On December 15, 2014, after a hearing, the court denied the motion. Madhu appealed. In April 2018, this court affirmed the trial court's order denying Madhu's motion to enforce child support arrearages. (*In re Marriage of Khera & Sameer* (Apr. 12, 2018, F070938) [nonpub. opn.].)

Ex-husband's Attorneys

During the marriage dissolution proceeding in Santa Clara Superior Court, ex-husband was represented by Benett, Becker and their law firm, Benett & Becker. However, during some intervals, ex-husband represented himself. Specifically, Becker represented ex-husband from the start of the dissolution proceeding until April 14, 2006, when a substitution of attorney was filed and ex-husband began representing himself. On November 1, 2006, ex-husband ceased representing himself in the marriage dissolution proceeding and Benett, Becker and their law firm substituted in as his counsel. On March 25, 2008, ex-husband resumed representing himself. On March 24, 2009, Benett filed a notice of limited scope representation stating she would represent ex-husband at a March 26, 2009, hearing and any continuance of that hearing. On February 14, 2014, ex-husband and Benett filed another substitution of attorney in the marriage dissolution proceeding stating ex-husband would represent himself.

Schreiber represented ex-husband in the matter before the Fresno Superior Court. In July 2008, Schreiber substituted as counsel of record in that proceeding and was still acting as his counsel when her anti-SLAPP motion was filed in April 2015. Schreiber did not appear as counsel of record in the proceeding in Santa Clara Superior Court.

PROCEEDINGS

Earlier Actions

On December 5, 2014, Madhu, representing herself and her two minor children, filed a complaint against ex-husband and Does 1 through 50 in Fresno Superior Court.[5] The lawsuit was assigned case No. 14CECG03660. The causes of action in the complaint were labeled (1) breach of fiduciary duty, (2) loss of income, (3) loss of future earnings, (4) personal injury and damages, (5) pain and suffering, and (6) obstruction of justice. Paragraph No. 4 of the complaint stated: "Plaintiffs have also filed a Petition for Order Allowing Plaintiffs to File Pleading Against Attorney Lenore Schreiber, Susan Bennett [*sic*] and Lewis Becker, based on attorney client conspiracy (CCP 1714.10)." In January 2015, Madhu filed an amended complaint that did not list the minor children as plaintiffs. In February 2015, Madhu filed a motion requesting leave to file a second amended complaint.

On December 10, 2014, Madhu, representing herself and her two minor children, filed a document labeled "Petition for Order Allowing Plaintiffs to File Pleading Against Attorneys Based on Attorney Client Conspiracy (CCP 1714.10), Malicious Prosecution, Abuse of Process, RICO, and Supporting Declaration of Madhu Sameer."[6] The petition was filed in Fresno Superior Court, was assigned case No. 14CECG03709, and listed Attorneys as the respondents. On March 17, 2015, the court issued a minute order denying the petition without prejudice.

---

[5]Madhu filed the complaint 10 days before the Fresno Superior Court denied her motion to enforce child support arrearages from 2003 through 2012.

[6]On January 29, 2015, Madhu also filed a petition in Santa Clara Superior Court, which was assigned case No. 1-15-CV-276201. A copy of the petition is not included in the clerk's transcript, but Attorneys represent the petition also sought leave under Civil Code section 1714.10 to file a pleading alleging Attorneys conspired with their client.

Operative Complaint

The operative complaint for purposes of this appeal was filed by Madhu on February 2, 2015, in Fresno Superior Court and assigned case No. 15CECG00351. The defendants named in the complaint were ex-husband, Attorneys, and others involved in the dissolution and child support proceedings. The causes of action against Attorneys were labeled (1) fraud and fraud upon the court, (2) malicious prosecution and abuse of process, (3) personal injury, (4) pain and suffering, (5) conspiracy, (6) breach of fiduciary duty and conspiracy to breach fiduciary duty, (7) Racketeer Influenced and Corrupt Organizations Act (RICO),[7] (8) obstruction of justice, (9) perjury, (10) acts of moral turpitude, (11) unfair business practices, and (12) negligent representation. The complaint also contained causes of action pertaining solely to Madhu's former attorneys; those causes of action are not relevant to this appeal.

Among other things, Madhu alleged that, from 2004 to the present, Attorneys (1) advised, aided and abetted ex-husband in making numerous false written and oral representations about his income and assets; (2) conspired with ex-husband to violate various court orders; and (3) made false representations in court to prevent her from receiving child support arrearages and reimbursements. An example of an allegedly false statement is given in Madhu's allegation that in February 2008, ex-husband and Attorneys "*willfully and knowingly* made false written and oral representation to the Santa Clara Court that Department of Child Support Services did not have jurisdiction on Child Support matter. This was untrue." (Italics in original, some capitalization omitted.)

---

[7]RICO is contained in sections 1961 through 1968 of title 18 of the United States Code. Madhu also is pursuing RICO claims in federal district court. In December 2017, more than two years after judgments were filed in favor of Attorneys in this matter, Madhu filed a 164-page complaint alleging many claims against numerous defendants under RICO and other statutes. (See *Sameer v. Khera* (E.D.Cal. Aug. 6, 2018, No. 1:17-CV-01748 DAD EPG) [2018 U.S. Dist. Lexis 132021, 2018 WL 3753023] [order denying request for temporary restraining order].)

Madhu's obstruction of justice cause of action alleged Attorneys were guilty of (1) preventing a federal agency, DCSS, from performing its duty for 12 years and (2) stalling, causing delays, and otherwise obstructing the superior courts from reaching a resolution on the matter. Madhu alleged these actions constituted criminal offenses and requested "that appropriate referrals be made to the State Bar and District Attorney's office."

Demurrers

In March 2015, Schreiber responded to the complaint by filing a demurrer. The demurrer contended (1) Madhu had failed to allege facts sufficient to state a cause of action, (2) most of the claims were barred by the litigation privilege in Civil Code section 47, and (3) the conspiracy claim was barred by the failure to comply with Civil Code section 1714.10. Similarly, in April 2015, Benett, Becker and their law firm filed a demurrer.

Anti-SLAPP Motions

On Monday, April 13, 2015, after the demurrers were filed, Benett, Becker and their law firm filed a special motion to strike all the causes of action against them pursuant to section 425.16. The anti-SLAPP motion contended the causes of action arose from protected activity, and Madhu could not demonstrate a reasonable probability of prevailing.

The next day, on April 14, 2015, Madhu filed (1) a notice of motion requesting leave to file a first amended complaint (FAC) and (2) points and authorities in support of her request.[8] A copy of the proposed FAC was attached to the points and authorities as an exhibit. It was 127 pages long and contained 861 numbered paragraphs relating to 12 causes of action.

---

[8]The caption of the points and authorities and the first line of the document referred to a supporting declaration. However, no declaration was included.

On Friday, April 17, 2015, Schreiber filed an anti-SLAPP motion. Schreiber supported her motion with a request for judicial notice that contained, among other things, documents showing that on July 14, 2008, she substituted in as ex-husband's counsel in the child support matter assigned case No. 05CEFS02946 by the Fresno Superior Court.

On April 28, 2015, Madhu filed (1) an opposition to Schreiber's demurrer, (2) an opposition to the demurrer of Benett, Becker and the law firm of Benett & Becker, and (3) an ex parte request for more time to file a response to the anti-SLAPP motion filed by Benett and Becker and for permission to submit points and authorities exceeding 15 pages. Madhu's oppositions to the demurrers stated she had filed a motion requesting leave to file the FAC and the FAC addressed the issues raised by Attorneys' demurrers.

On May 4, 2015, Madhu filed a 138-page opposition to the anti-SLAPP motion of Benett, Becker and their law firm. That same day, Madhu also filed a two-page opposition to Schreiber's anti-SLAPP motion. That opposition argued (1) Schreiber's motion was untimely because it was filed after Madhu filed her request for leave to file the FAC and (2) the motion should "be denied on the basis of late service." Alternatively, Madhu requested the hearing on Schreiber's motion be continued so that Madhu could have an adequate time to respond.

Attorneys filed oppositions to Madhu's motion requesting leave to file the FAC. The oppositions argued the motion suffered from many procedural defects, did not rectify the deficiencies noted in the anti-SLAPP motions, and should not be allowed because it would simply increase Attorneys' cost of defending themselves, which would undermine the purpose of section 425.16.

On May 11, 2015, Madhu filed a motion for consolidation requesting this case be consolidated with case Nos. 14CECG03660 and 14CECG03709 and transferred to Department 503 of the Fresno Superior Court. This motion was set for hearing on June 17, 2015, in Department 503.

Hearing & Order

On May 21, 2015, the trial court held a hearing on the pending motions and demurrers. After the hearing, the trial court filed a minute order adopting the tentative ruling and granted both anti-SLAPP motions. The court stated it had not considered Madhu's late-filed opposition to the anti-SLAPP motions. The court stated Attorneys had met their burden of demonstrating the conduct alleged in the complaint involved their representation of ex-husband in the underlying child support matter and, thus, was protected under section 425.16, subdivision (e). The court also stated Madhu had "failed to meet her opposing burden."

The trial court denied Madhu's motion for leave to file the FAC. The court stated the "motion does not comply with California Rules of Court, rule 3.1324; in particular, because it is unaccompanied by a declaration."

Judgments

On May 28, 2015, the court entered a judgment in favor of Schreiber based on the order granting Schreiber's anti-SLAPP motion. On June 9, 2015, a similar judgment was filed in favor of Benett, Becker, and Benett & Becker. In August 2015, an amended judgment was filed that awarded Schreiber attorney fees of $12,314.50 and costs of $555.

On June 8, 2015, Madhu filed a notice of appeal from the order entered on May 21, 2015. Pursuant to statute, "an order granting or denying a special motion to strike under Section 425.16" is immediately appealable. (Code Civ. Proc., §§ 904.1, subd. (a)(13), 425.16, subd. (i).)

Other Appeals and Writs

As background, we note the related appeals and writs filed in this court. The Fresno Superior Court case underlying this appeal has produced two other appeals. Case No. F074544 is Madhu's appeal from an order awarding attorney fees to Attorneys. That appeal is still pending. Case No. F072323 was an appeal taken by other attorney defendants from an order denying their anti-SLAPP motions. Those attorneys had

represented Madhu in the dissolution and child support matters. Case No. F072323 also included a cross-appeal by Madhu. The appeal was dismissed in 2015 and Madhu's cross-appeal was dismissed in 2016.

Next, the child support matter filed in Fresno Superior Court, case No. 05CEFS02946, has generated two matters in this court. In August 2016, case No. F073332 was dismissed on the ground it was taken by Madhu from a nonappealable minute order denying a motion to compel. In April 2018, this court affirmed the trial court's order denying Madhu's motion to enforce child support arrearages. (*In re Marriage of Khera & Sameer*, *supra*, F070938 [nonpub. opn.].)

Case No. F073777 is an appeal by Madhu from an order granting ex-husband's anti-SLAPP motion in Fresno Superior Court, case No. 14CECG03660. We denied Madhu's request to consolidate the matter involving ex-husband with the instant appeal.

In September 2018, we granted Madhu's request to augment the appellate record to include the request for judicial notice she filed in the trial court on May 4, 2015, together with the attached exhibits. After an augmented clerk's transcript containing 362 pages was filed in October 2018, Madhu filed a document labeled "Notice of Fraud Upon the Court" stating exhibits to her May 4, 2015, request for judicial notice had been removed and were not included in the augmented clerk's transcript. Some of the exhibits Madhu claimed were missing were not, and some were not part of the augmented clerk's transcript. We granted Madhu permission to submit a copy of the missing exhibits. Madhu submitted copies and on December 6, 2018, we ordered the record be augmented with the documents she had designated as exhibits 12, 13, 22, 37 and 41.

On December 19, 2018, the day before oral argument, counsel representing Schreiber notified this court that he would appear in person, rather than by telephone. Later that day, Madhu filed a document labeled "Objections" that opposed his appearing in person. Madhu also stated that if counsel was allowed to appear physically, she requested this court take judicial notice of the documents submitted in case No. F078293,

a recently filed appeal from orders entered in the child support matter. Madhu asserted the documents directly relate "to the continued misconduct, lies, and misrepresentation made by SCHREIBER in the underlying case 05 CEFS 02946 and shows an ongoing misconduct of the defendants." This request for judicial notice is denied, as it suffers from a number of procedural defects and appears to involve documents that were not before the trial court when it issued the orders challenged in this appeal.

DISCUSSION

Madhu's opening brief contains a section with the heading "ISSUES ON APPEAL." This section lists 13 claims of trial court error, some of which relate to the merits of the anti-SLAPP motion and some of which raise procedural issues. We begin with Madhu's argument about the authority of the trial court before addressing the merits of the anti-SLAPP motions and her claims of procedural error.

I. Trial Court's Jurisdiction

Madhu contends the trial court did not have the authority to hear the anti-SLAPP motions because a motion for consolidation was pending in another department. Attorneys point out that Madhu has provided no authority to support her argument that the filing of a motion to consolidate in another department divested the trial court of the authority to hear and decide the anti-SLAPP and other motions pending before it.

On appeal, it is the appellant's responsibility to affirmatively demonstrate prejudicial trial court error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To guide appellants in carrying their burden of demonstrating prejudicial error, California Rules of Court, rule 8.204(a)(1)(B) provides that appellate briefs must "support each point by argument and, if possible, by citation of authority." Here, Madhu has not cited any case law, statute, or rule of court supporting her claim that the trial court was mandated to wait until the motion for consolidation was decided before ruling on the pending motions in the present case.

The absence of a citation to authority is not always determinative because it is possible for a party to make "'"a reasoned 'argument for the extension, modification or reversal of existing law.'"'" (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1081.) Here, Madhu's arguments are not convincing because they do not address the policy underlying section 425.16 of providing a quick and inexpensive procedure for weeding out meritless claims arising from protected activity. (See *San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 625–626 [anti-SLAPP motion is a procedural device invoked at initiation of the lawsuit to prevent costly, unmeritorious litigation].) If Madhu's argument were adopted, hearings of anti-SLAPP motions would be delayed until a motion for consolidation was heard and decided. Such a result would prolong the litigation and frustrate the basic policy underlying section 425.16. Accordingly, we reject the novel argument that the trial court lacked the jurisdiction or authority to decide the anti-SLAPP motion while Madhu's request for consolidation was pending.

II. Overview of Anti-SLAPP Statute

A. Statutory Text

Section 425.16 provides an expedited procedure for dismissing lawsuits filed primarily to inhibit the valid exercise of the constitutionally protected rights of speech or petition. (§ 425.16, subd. (a).) Subdivision (b)(1) of section 425.16 provides:

> "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

The application of this statutory text involves a two-step inquiry with shifting burdens. (*Flatley, supra*, 39 Cal.4th at p. 317; *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 489.)

B. Step One: Protected Activity

1. Basic Inquiry

The first step of the inquiry addresses whether the moving party has made a threshold showing that the challenged cause of action is one "arising from" a protected activity—that is, an activity "in furtherance of the person's right of petition or free speech." (§ 425.16, subd. (b)(1); see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) The statutory phrase "arising from" has been construed to mean "based on," not "in response to" or "triggered by." (*Cashman*, at pp. 77–78.) Consequently, the moving party must show "the plaintiff's cause of action itself was *based on* an act in furtherance of the [moving party's] right of petition or free speech." (*Id*. at p. 78.) The moving party meets this burden by demonstrating the act underlying the plaintiff's claim fits into a category of protected activity listed in subdivision (e) of section 425.16. (*Cashman*, at p. 78; *Castleman v. Sagaser*, *supra*, 216 Cal.App.4th at p. 489.)

As relevant to this appeal, protected activity includes any written or oral statement made (1) before a judicial proceeding or (2) in connection with an issue under consideration or review by a judicial body. (§ 425.16, subd. (e)(1), (2).) It also includes "any other conduct in furtherance of the exercise of the constitutional right of petition." (§ 425.16, subd. (e)(4).)

2. Illegal Conduct Exception

If the challenged causes of action arose from activity covered by subdivision (e) of section 425.16, we complete the first step by determining whether the "assertedly protected speech or petitioning activity was illegal as a matter of law, and therefore unprotected" by the anti-SLAPP statute. (*Flatley*, *supra*, 39 Cal.4th at p. 305.) This exception for illegal conduct sometimes is referred to as the *Flatley* exception. (E.g., *Collier v. Harris* (2015) 240 Cal.App.4th 41, 57.) The *Flatley* exception is narrow—it applies only where "the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence." (*Flatley*, *supra*, at p. 316; see *Mendoza v. ADP*

Screening & Selection Services, Inc. (2010) 182 Cal.App.4th 1644, 1654 [*Flatley* used the terms "illegal" and "illegality" to mean criminal, not any violation of a statute].) Under this narrow exception, "conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage … simply because it is *alleged* to have been unlawful or unethical." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910–911.)

If the *Flatley* exception does not apply, the first step ends with the conclusion that the activity is protected. In that situation, it is appropriate to grant the motion to strike unless the plaintiff makes the required showings addressed in the second step of the anti-SLAPP inquiry. (See *Collier v. Harris*, *supra*, 240 Cal.App.4th at p. 54 [showing defendant's conduct was illegal as a matter of law is preliminary to second step of inquiry].)

C. Step Two: Probability of Prevailing

The second step of the inquiry examines whether "the plaintiff has established that there is a [reasonable] probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) In other words, a plaintiff can defeat an anti-SLAPP motion by stating and substantiating a legally sufficient claim. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).) This is done by demonstrating the pleading is both legally sufficient and supported by sufficient evidence to make a prima facie showing of facts that would sustain a favorable judgment. (*Ibid*.) When a plaintiff makes the required showings, the claims have the requisite merit to proceed. (See *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420 [second step of anti-SLAPP analysis prevents abusive SLAPP suits] (*Vasquez*).)

In the present case, Attorneys have raised the litigation privilege as an affirmative defense to most of Madhu's claims. The litigation privilege is "relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff

must overcome to demonstrate a probability of prevailing." (*Flatley, supra*, 39 Cal.4th at p. 323.) When evaluating such an affirmative defense, courts "generally should consider whether the defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense." (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434 [defendant's evidence did not establish a truth defense to the defamation claim; denial of anti-SLAPP motion affirmed].)

D. Standard of Review

The parties agree that "[r]eview of an order granting or denying a motion to strike under section 425.16 is de novo." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) Under this standard, appellate review entails the same two-step inquiry undertaken by the trial court and examines whether the parties have satisfied their respective burdens. (*Castleman v. Sagaser, supra*, 216 Cal.App.4th at p. 490.) In completing this inquiry, an appellate court must "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) Like the trial court, the appellate court does not weigh credibility or compare the weight of the evidence. (*Soukup, supra*, at p. 269, fn. 3.) "Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

III. Protected Activity

A. Case Law Involving Claims Against Attorneys

1. Overview

Many published anti-SLAPP decisions involve attorneys who were named as defendants in a lawsuit and responded by filing a motion to strike under section 425.16.

The decisions involving defendant attorneys can be divided into two broad categories based on whether or not an attorney-client relationship existed between the plaintiff and the defendant attorneys. (See *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1227 [distinction drawn between causes of actions brought against attorneys by clients and those brought by nonclients].)

The first category contains cases where the attorneys were sued by a client or former client. (E.g., *Freeman v. Schack* (2007) 154 Cal.App.4th 719 [§ 425.16 not applicable to claims against former attorney for breach of contract and breach of fiduciary duty]; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179 [reversed order striking lawsuit against former attorney for breach of duty of loyalty].) Generally, the protections of section 425.16 do not extend to a client's causes of action arising from litigation-related activities undertaken by the attorney for the plaintiff-client. (*PrediWave Corp. v. Simpson Thacher & Bartlett LLP*, *supra*, 179 Cal.App.4th at p. 1228.)

Madhu's lawsuit falls within the second category, which contains cases where the plaintiff sued opposing counsel—that is, attorneys who represented a party whose interests were adverse to the plaintiff. (E.g., *Contreras v. Dowling* (2016) 5 Cal.App.5th 394 [tenant sued her landlords and her landlords' attorney for tenant harassment] (*Contreras*).) The lawsuits by nonclients against attorneys sometimes include allegations that the attorney *aided and abetted* his or her client's wrongful conduct or *conspired* with his or her client against the plaintiff. (*Id*. at pp. 398, 413 [tenant alleged landlords' attorney aided and abetted the landlords' wrongful entries into her apartment]; *Bergstein v. Stroock Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793 [borrower sued lender's attorneys for aiding and abetting disclosure of confidential information]; *Graham-Sult v. Clainos* (9th Cir. 2014) 756 F.3d 724 [sons sued attorney who represented executor of father's estate for aiding and abetting executor's conversion of father's property and for conspiring with executor to convert the property].) Here, Madhu has alleged Attorneys

conspired with ex-husband and aided and abetted his wrongful conduct, including defrauding her of child support.

2. General Principles Applicable to Attorneys

Pursuant to the plain language of section 425.16, subdivision (e)(1) and (2), all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding are per se protected as petitioning activity. (*Contreras*, *supra*, 5 Cal.App.5th at pp. 408–409.) Under this principle, an attorney's letter to opposing counsel written after a lawsuit was filed and responding to claims against his clients is "unquestionably protected activity under section 425.16." (*Id*. at p. 409.) Likewise, an attorney's advice to his or her clients is protected activity under the statute. (*Ibid*.)

When a plaintiff has alleged the attorney defendants aided and abetted their client's wrongful conduct or conspired with their client against the plaintiff, the court examines the actions of the attorney defendants themselves, not the conduct they allegedly aided and abetted. (*Contreras*, *supra*, 5 Cal.App.5th at p. 410.) This focus on the attorneys' actual activities means labels such as "conspiracy" and "aided and abetted" have little influence in determining whether the attorneys' activity is protected under section 425.16. (*Contreras*, at p. 410.) For instance, in *Cabral v. Martins* (2009) 177 Cal.App.4th 471, the plaintiffs' cause of action against the attorney defendants arose from the attorneys' revision of a will, initiation of probate proceedings, and defense of judicial proceedings related to the will. (*Id*. at pp. 479–483.) These acts by the attorney were protected under the statute. (*Ibid*.) The protection of section 425.16 applied despite the plaintiff's allegations that the attorneys were assisting their clients in evading child support statutes. (*Cabral*, at p. 480.)

B. Acts Underlying Madhu's Causes of Action

Based on the foregoing principles, we turn to Madhu's complaint and the activity of Attorneys upon which she bases her causes of action. A synopsis of Madhu's claims is provided in paragraph No. 27 of the complaint, which states:

> "The injuries in this instance are the consequence of [u]nlawful and wrongful conduct of [Attorneys] in the underlying Child Support case first filed in Santa Clara County in 2003, and then re-filed in Fresno County in 2005 by Department of Child Support Services. The matter continues to be contested for the past 12 years due to alleged misconduct of [Attorneys]. The litigation over 12 years has caused great distress to [Madhu], and has prevented her from completing her education, and from being able to work. [Madhu]'s injury and damages are proximately and ultimately caused by the actions of [Attorneys]."

Madhu's general reference to "wrongful conduct" and "misconduct" related to the child support issue is expanded upon in her subsequent allegations.

1. False Statements Made in Court

Madhu alleges the temporary child support ordered by the court in early 2004 was based on ex-husband's misrepresentations of his income.[9] She further alleges that, from January 2004 until the date of her complaint, ex-husband—aided and abetted by Attorneys—made numerous false written and oral representations about his income and assets to the courts in Santa Clara County and Fresno County. In addition to aiding and abetting ex-husband's false statements, Madhu alleges the Attorneys themselves "made false representations in Court to prevent [Madhu] [from] receiving appropriate ongoing child support, arrearages and reimbursements." These false representations by Attorneys related to (1) the number of dependent children for child support purposes, (2) jurisdictional issues, including arguments "that the parties had not assigned the right to

[9]When the dissolution petition was filed in 2003, ex-husband was employed by Cisco Systems, Inc. He continued to work there until July 2011, when he voluntarily resigned and took a severance package. A copy of ex-husband's 2003 federal income tax return lists his total income as $271,193. In 2014, the court found ex-husband's 2011 income totaled $924,373.39.

set child support to any public agency" and that DCSS lacked jurisdiction, and (3) Madhu's earning potential. In addition, Madhu alleges ex-husband and Attorneys willfully and knowingly underreported his income by over $300,000 per annum. Madhu further alleges that, as a result of these false verbal and written representations, the Santa Clara Superior Court was influenced to make a child support order of $2,800 per month. This amount compares to the $8,100 in monthly child support requested in DCSS's January 2008 motion.

The foregoing conduct of Attorneys involves written and oral statements to the courts in the child support proceedings, which statements are part of Madhu's claim that Attorneys committed fraud upon the courts. Under section 425.16, subdivision (e)(1), protected activity includes "any written or oral statement or writing made before a … judicial proceeding." Pursuant to this statutory text, Attorneys' statements made in court qualify as protected activity despite the allegations of fraud and of knowledge that the statements were untrue. (*Contreras, supra*, 5 Cal.App.5th at pp. 408–409 [all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding are per se protected as petitioning activity].)

2. Contempt Motions

Paragraph No. 53 of Madhu's complaint alleges ex-husband and Attorneys filed several meritless contempt motions against her that included false allegations and were intended to harass and intimidate her. It is well established "that filing petitions, motions, and briefs in court (and/or assisting in the filing) are protected petitioning activities under the anti-SLAPP statute." (*Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 880.) Consequently, we conclude Attorneys' participation in the filing of the motions for contempt was protected activity.

3. Threats Made to Madhu's Counsel

Madhu alleges ex-husband and Schreiber "repeatedly threatened, intimidated, and attempted to blackmail [Madhu] via" the attorneys representing her. It is established that an attorney's communication with opposing counsel made after litigation has commenced is "unquestionably protected activity under section 425.16." (*Contreras*, *supra*, 5 Cal.App.5th at p. 409.) Therefore, we conclude the alleged threats and attempted blackmail made via Madhu's counsel is protected activity. Madhu's claim that this and other conduct was illegal and, therefore, not protected activity is addressed in part III.C, *post*.

4. Concealment

Madhu alleges that between 2003 and the date of her complaint, Attorneys concealed information about ex-husband's assets and income, which caused her significant damage. On appeal, Madhu argues the concealment of income and assets was a noncommunicative act and, therefore, unprotected.

Generally, concealing information by failing to disclose it to the court is not an affirmative act, but rather the failure to act. Subdivision (b)(1) of section 425.16 refers to "any act" in furtherance of the right of petition or free speech. Section 425.16, subdivision (e)(4) defines such an "act" to include "any other conduct in furtherance of the exercise of the constitutional right of petition." The references in section 425.16 to an "act" and "conduct" have been interpreted to include omissions and concealments made in litigation or settlement. (*Suarez v. Trigg Laboratories*, *Inc.* (2016) 3 Cal.App.5th 118, 123–124; see *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89–90.) Accordingly, we conclude Attorneys' alleged concealment of information about ex-husband's income and assets qualifies as other conduct in furtherance of the right to petition and, thus, is protected activity for purposes of section 425.16.

Madhu's claim that the concealment of ex-husband's income and assets violated court orders and, therefore, was illegal and not protected activity is addressed in part III.C, *post*.

5. Physical Acts

Madhu's allegations of wrongful conduct by Attorneys extends beyond statements made in court, the filing of papers in court, and communications with her counsel. Paragraph No. 52 of Madhu's complaint alleges that, during the trial, ex-husband and Schreiber visited her home and "*physically* harassed, intimidated and threatened [her and her two sons], solely with the intention of seeking better outcome in the trial." (Italics in original.) In view of the generality of this allegation, which provides no details about what Schreiber actually did and said during the visit to Madhu's home, we conclude the alleged activity by Schreiber qualifies as "other conduct in furtherance of the exercise of the constitutional right of petition" (§ 425.16, subd. (e)(4)) and, therefore, is protected activity. A contrary interpretation of the allegations would reward vague pleading. We recognize the FAC contains more detailed factual allegations about Schreiber's visit to Madhu's home; those allegations are addressed in part VI.B.2, *post*.

6. Violation of Court Orders

Madhu alleged Attorneys "have conspired with [ex-husband] and engaged in meritless litigation for 12 years" and encouraged, aided and abetted ex-husband "in violating court orders." Paragraph No. 38 of the complaint adds a timing element to the conspiracy by alleging that between January 2004 and the date of the complaint, Attorneys conspired with ex-husband "to violate various court orders."

In *Contreras*, *supra*, 5 Cal.App.5th 394, the court determined that the plaintiff's "[c]onclusory allegations of conspiracy or aiding and abetting do not deprive [the attorney's] actions of their protected status" and noted the complaint alleged no facts showing how the attorney might have assisted his client's allegedly wrongful entry into

the plaintiff's apartment. (*Id*. at p. 413.) Similarly, Madhu's allegations of conspiracy and aiding and abetting ex-husband's violation of "various court orders" lack specific factual detail to state claims different from the allegations that Attorneys concealed information and made false statements to the court and to Madhu. Therefore, Madhu's allegations of conspiracy and aiding and abetting violations of various court orders do not allow her to avoid the anti-SLAPP statute. (*Ibid*.)

C. Illegality

1. Contentions

Madhu contends that even if the conduct of Attorneys qualifies under the statutory text as acts in furtherance of petitioning activity, the conduct is not protected because it was illegal. Madhu interprets *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696 (*Lefebvre*) as holding "before speech or actions become constitutionally protected, there should be a *showing that they were not supporting illegal activities*." Thus, Madhu implies Attorneys were required by applicable law to make this showing and explicitly contends there was no such showing in this case. She argues that "[w]ithout such a showing, the ruling of the trial court should be reversed on the ground that [section] 425.16 does not protect the speech and acts at issue."

2. Test for Illegality

In general terms, the *Flatley* exception described in part II.B.2, *ante*, provides that illegal conduct is not protected activity. In stating the *Flatley* exception, the Supreme Court used the term "illegal" to mean criminal and did not intend it to include every violation of a statute. (*Mendoza v. ADP Screening & Selection Services, Inc.*, *supra*, 182 Cal.App.4th at p. 1654.) Furthermore, the alleged "conduct must be illegal *as a matter of law* to defeat a defendant's showing of protected activity. The defendant must concede the point, or the evidence conclusively demonstrate it, for a claim of illegality to defeat an anti-SLAPP motion at the first step." (*Vasquez, supra*, 1 Cal.5th at p. 424.)

First, we consider Madhu's interpretation of *Lefebvre* and her contention that defendants pursuing an anti-SLAPP motion must show their protected activity did not support illegal activities. Based on existing case law, we conclude California law does not require a moving party to make a showing that his or her conduct, which was protected by section 425.16, did not support illegal activities. Instead, California law requires the criminality to be (1) conceded or (2) conclusively demonstrated by the evidence. (*Flatley*, *supra*, 39 Cal.4th at p. 316.)

Second, we consider Madhu's argument that Attorneys' conduct is protected activity for purposes of constitutional law and section 425.16 only if there has been a showing of state action. Madhu's argument was based on *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013 and our Supreme Court's conclusion "that California's free speech clause contains a state action limitation." (*Id*. at p. 1023.) In that case, the tenants' association claimed its right to free speech allowed it to distribute leaflets and a newsletter within the apartment complex, which was owned by a private entity not a government agency. The court concluded the free speech clause did not require the owner to allow the tenants' association to distribute leaflets and the newsletter within the privately owned complex because the complex was not the equivalent of a traditional public forum. Here, Attorneys are not claiming a constitutional right to freely express their views on privately owned property. Instead, their asserted constitutional right relates to petitioning activity *in state court*. The state action limitation discussed in *Golden Gateway* and applied to the exercise of free speech does not extend to the constitutional right of petitioning, which is necessarily related to a public forum—that is, either a federal or state court. Therefore, we reject Madhu's argument relating to a state action limitation.

3. No Concession of Illegality

Here, Attorneys have not conceded the illegality of their conduct. Thus, this case is not comparable to *Lefebvre*, where the plaintiff's former wife admitted she had made a false police report asserting that the plaintiff had threatened to kill her and their children. (*Lefebvre*, *supra*, 199 Cal.App.4th at pp. 699, 705.) Such reports to the police are a crime under Penal Code section 148.5. (*Lefebvre*, *supra*, at p. 701.)

4. No Conclusive Evidence of Illegality

Besides admissions of illegality, the *Flatley* exception applies when the evidence conclusively shows a defendant's conduct was illegal. (*Flatley*, *supra*, 39 Cal.4th at p. 316.) Our Supreme Court has recognized that making a conclusive showing of illegality is "a narrow circumstance." (*Ibid*.) Despite this narrowness, conclusive showings have been made where an attorney writes a demand letter that constitutes extortion and the demand letter is a part of the record before the court. (*Flatley*, *supra*, at p. 330 [attorney defendant's letter and subsequent phone calls constituted criminal extortion as a matter of law]; *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 318 [record showed defendant's action related to filing a State Bar complaint constituted extortion and, thus, was not protected by § 425.16]; see *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1298–1300 [denial of anti-SLAPP motion reversed because prelitigation demand letter was neither admitted extortion nor extortion on its face].)

In comparison, the evidence in this case does not *conclusively* establish the Attorneys' assertedly protected activity was criminal. On appeal, Madhu has addressed the showing as to illegality by arguing Attorneys were required to make a showing that the activity they claimed was protected did not support illegal activities. By taking this approach, Madhu has not undertaken the more difficult task of demonstrating the evidence in the record conclusively established the illegality of Attorneys' conduct. Furthermore, based on our review, it does not appear the evidence in the record conclusively demonstrates Attorneys engaged in criminal activity. For instance, Madhu's

allegations about illegal threats and blackmail are not conclusively established by the evidence. Unlike the cases where an extortionate demand letter is part of the record, there is no documentation conclusively establishing the content of the threats or blackmail and when, where, and to whom such threats or blackmail were made.

In summary, Attorneys may invoke the protections of section 425.16 because the asserted illegality of their conduct has not been established as a matter of law. They have not conceded committing acts that are criminal and the evidence in the record does not conclusively demonstrate their assertedly protected activity was criminal. Therefore, Madhu's arguments relating to illegality have not demonstrated trial court error.

IV. Probability of Prevailing

The second step of the anti-SLAPP analysis examines whether the plaintiff has established a reasonable probability of prevailing on the claim. (§ 425.16, subd. (b)(1).) A reasonable probability exists when (1) the complaint is legally sufficient to state the cause of action and (2) the cause of action is supported by a prima facie showing of facts sufficient to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Rusheen*, *supra*, 37 Cal.4th at p. 1056.) When examining the prima facie showing of facts, "[t]he plaintiff's evidence is accepted as true; the defendant's evidence is evaluated to determine if it defeats the plaintiff's showing as a matter of law." (*Vasquez*, *supra*, 1 Cal.5th at p. 420.)

A. Stating a Legally Sufficient Claim

1. Conspiracy

Madhu's fifth cause of action is labeled conspiracy and alleges Benett and Becker and the other defendants "were involved in a conspiracy to defraud [Madhu] in the underlying family law matter." The fifth cause of action also alleges the conspiracy and ex-husband's actions as a principal in that conspiracy was the proximate and ultimate cause of her injuries and damages. Madhu's sixth cause of action is labeled breach of

fiduciary duty and conspiracy to breach fiduciary duty. That cause of action alleges ex-husband breached his fiduciary duty to Madhu and their children, and further alleges Attorneys were "involved in directly or indirectly aiding and abetting him, advising and encouraging him in breaching his fiduciary duty towards [Madhu] and her children."

In certain situations, attorneys may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy. (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 46.) In 1988, the Legislature added section 1714.10 to the Civil Code. (Stats. 1988, ch. 1052, § 1, pp. 3407–3408; see *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 718.) Civil Code section 1714.10 requires plaintiffs to demonstrate a reasonable probability of success before suing an attorney under the theory that the attorney conspired with a client during the course of representing that client. (*College Hospital, Inc., supra,* at p. 718.) Specifically, subdivision (a) of Civil Code section 1714.10 provides that certain claims against an attorney for civil conspiracy with his or her client shall not be included in a complaint unless the court enters an order allowing the claim to be filed. Permission from the court is conditioned upon the plaintiff establishing he or she has a reasonable probability of prevailing in the action. The failure to obtain a court order is a defense to any action for civil conspiracy filed without such an order. (Civ. Code, § 1714.10, subd. (b).) An attorney charged with a conspiracy shall raise the defense upon that attorney's first appearance by demurrer or motion to strike. (*Ibid*.)

Here, the record does not contain a court order authorizing Madhu to proceed with her claim of civil conspiracy against Benett and Becker. Consequently, Civil Code section 1714.10 operates as a defense to her conspiracy claims. As a result of this defense, Madhu is unable to show she has a reasonable probability of prevailing on the claims, and the trial court properly struck those claims pursuant to section 425.16.

Madhu seeks to avoid the application of Civil Code section 1714.10 by arguing Benett and Becker lied to the superior courts, exceeded their legal duty to ex-husband

and, therefore, "are to be treated as non-attorneys" who cannot claim the litigation privilege or rely on Civil Code section 1714.10. Madhu cites *Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136 to support this argument. We conclude Madhu's reliance on *Rickley* is misplaced. The attorney defendants in that case "owed plaintiffs an independent legal duty with respect to the funds held in the attorneys' trust account." (*Id*. at p. 1156.) The attorney defendants held the funds for the remediation of both the plaintiffs' and their clients' property and, as a result, had a duty to disburse the money equitably for the benefit of all parties without favoritism to their clients. (*Ibid*.) The plaintiffs' request to add the attorney defendants to the complaint on a conspiracy theory was allowed by the trial court. In short, *Rickley* is a case where the plaintiffs complied with Civil Code section 1714.10 before naming the attorneys as defendants. (*Rickley*, at p. 1147.) *Rickley* does not support Madhu's theory that the statutory requirements do not apply because Benett and Becker should be treated as nonattorneys. Consequently, we reject Madhu's arguments that Civil Code section 1714.10 does not apply to her conspiracy claims against Benett and Becker.

2. Perjury

Madhu's perjury cause of action alleges Attorneys and the other "defendants have perjured themselves repeatedly by lying and misrepresenting facts under oath, thr[ough] written pleadings, and thr[ough] oral testimony." Attorneys contend this cause of action fails because "[t]here is no civil cause of action for 'perjury'" under California law. (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1429 [affirmed order sustaining demurrer without leave to amend as to entire complaint, including perjury cause of action].)

The general principles used to determine whether the violation of a California statute gives rise to a private cause of action are set forth in *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592 (*Lu*), at pages 596 through 597. Whether a party has a

right to sue for a violation of a statute depends upon whether the Legislature has manifested an intent to create a private cause of action under the statute. Under Penal Code section 118, the elements of perjury are a willful statement, under oath, of any material matter that the witness knows to be false. (*Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 735.) Under Penal Code section 127, a "person who willfully procures another person to commit perjury is guilty of subornation of perjury." Penal Code sections 118 and 127 do not *expressly* state a violation of their provisions renders a person liable under civil law. (See *Lu*, *supra*, at p. 597.) Also, those sections do not refer to a remedy or means of enforcing their provisions. (*Ibid*.) Furthermore, Madhu has presented no legislative history strongly implying the Legislature intended to create a private cause of action despite the statute's silence on the subject. (*Id*. at pp. 597, 600.) Accordingly, based on the principles set forth in *Lu* and consistent with the holding in *Pollock v. University of Southern California*, we conclude there is no private cause of action for violations of California's perjury statutes.

It follows that Madhu cannot demonstrate a reasonable probability of prevailing on the perjury claim. Accordingly, the trial court appropriately struck the perjury claim pursuant to section 425.16.

3. Obstruction of Justice

Madhu's cause of action labeled obstruction of justice alleges Attorneys and the other defendants attempted to prevent DCSS from performing its duty for 12 years and also attempted to prevent the superior court from performing its duty in a lawful and timely manner. Attorneys contend there is no civil cause of action for "obstruction of justice." In response, Madhu's reply brief argues obstruction of justice is a viable claim under section 1505 of title 18 of the United States Code and asserts that DCSS is a federal agency.

Initially, we consider whether federal law provides a private right of action based on crimes involving the obstruction of justice. Congress has addressed the obstruction of justice in chapter 73 of part I of title 18 of the United States Code, which consists of sections 1501 through 1521. Section 1505 of title 18 of the United States Code addresses obstruction of any proceeding before any department or agency of the United States. Madhu has failed to state a cause of action under this provision. First, neither the superior court nor DCSS is a "department or agency of the United States" as that phrase is used in title 18 United States Code section 1505. Second, and more significantly, no private cause of action may be brought for an alleged violation of title 18 United States Code section 1505. (*Hamilton v. Reed* (6th Cir. 2002) 29 Fed.Appx. 202, 204.) In short, federal law does not recognize a civil cause of action for obstruction of justice.

Next, we consider whether California law recognizes a civil cause of action for obstruction of justice. Madhu has cited, and we have located, no California authority recognizing a civil cause of action for obstruction of justice. Possible bases for such a cause of action are Penal Code sections 135 and 182. Penal Code section 135 states it is a misdemeanor to conceal documentary evidence with the intent to prevent it from being produced. Penal Code 182, subdivision (a)(5) makes it a crime for two or more persons to conspire to "pervert or obstruct justice, or the due administration of the laws." These statutes do not *expressly* (1) state a violation of their provisions renders a person liable under civil law or (2) refer to a remedy or means of enforcing their provisions. (See *Lu, supra,* 50 Cal.4th at p. 597.) Also, the record contains no legislative history providing a "clear indication that the Legislature intended to create a private cause of action under the statute[s]." (*Id*. at p. 600.) Therefore, we conclude California law does not recognize a private right of action for obstruction of justice. (See *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 766; see also *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 466 ["no tort cause of action will lie for intentional third party spoliation of evidence"]; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 17

[there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action].)

Consequently, Madhu has failed to demonstrate a reasonable probability of prevailing on her cause of action for obstruction of justice and obtaining the relief requested—specifically, "that appropriate referrals be made to the State Bar and District Attorney's office." Therefore, the trial court appropriately struck the obstruction of justice claim and the request for referrals.

4. Moral Turpitude

Madhu's tenth cause of action is labeled acts of moral turpitude. It alleges Attorneys and the other defendants "have committed acts of moral turpitude" that are the proximate and ultimate cause of Madhu's injuries and damages. Attorneys argue Madhu has provided no authority to demonstrate that "moral turpitude" is a cause of action that may be alleged in the context of the instant civil action. We agree. Madhu has provided no authority demonstrating California law recognizes a cause of action for acts of moral turpitude. Consequently, Madhu has failed to demonstrate a reasonable probability of prevailing on the tenth cause of action in her complaint.

5. Unfair Business Practices

Madhu's eleventh cause of action is labeled unfair business practices and alleges Attorneys and the other defendants have violated several provisions of the Business and Professions Code, the Rules of Professional Conduct adopted by the State Bar of California, and the Model Rules of Professional Conduct published by the American Bar Association.

Business and Professions Code section 17200 et seq. has been referred to as the Unfair Business Practices Act. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) Presently, it is described as the unfair competition law (UCL). (*Heckart v. A-1 Self Storage, Inc.* (2018) 4 Cal.5th 749, 755.) A statutory claim for unfair business

practices is a recognized cause of action. (See *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 562.) "A plaintiff alleging unfair business practices under [the California] statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

Here, Madhu's allegations that Attorneys violated several provisions of the Business and Professions Code and such acts were the proximate and ultimate cause of her injuries and damages fail to state with reasonable particularity the facts supporting the statutory elements of the violation alleged. Thus, Madhu has failed to demonstrate her complaint is legally sufficient to state the cause of action for unfair business practices. As a result, she has failed to demonstrate a reasonable probability of prevailing on that claim and it was appropriately struck pursuant to section 425.16.

6. RICO

Madhu's seventh cause of action is based on RICO. Paragraph No. 74 of the complaint alleges "a widespread criminal *enterprise* engaged in a *pattern of racketeering activity* across County lines, and a conspiracy to engage in *racketeering activity* involving numerous RICO predicate acts during the last twelve (12) calendar years." Madhu alleges the predicate acts "cluster around criminal collusion between attorneys, officers of the court in Fresno and Santa Clara County, to maximize the litigation costs, to protect corrupt and dishonest attorneys, to oppress women and children, and obstruction of justice." She also alleges the "primary objective of the racketeering *enterprise* has been to inflict severe and sustained economic hardship upon [her], with the intent of impairing, obstructing, preventing and discouraging [her] from seeking justice, property settlement and child and spousal support, and maximizing their fee." Madhu alleges all defendants cooperated "jointly and severally in the commission of two (2) or more of the RICO predicate acts that are itemized in the RICO laws at 18 U.S.C. §§ 1961, and did so in

violation of the RICO law at 18 U.S.C. 1962(b) (Prohibited activities)" (underscoring omitted), which offenses were committed "in a manner which they calculated and premeditated intentionally to threaten continuity, *i.e.* a continuing threat of the respective *racketeering activities*." Paragraph No. 85 of the complaint states the RICO "cause of action is being filed to preserve the statute. [Madhu] will file an amended complaint, with supplemental information, and evidence, at a later date."

A threshold legal question is presented by Madhu's contention that her RICO claims are not subject to the anti-SLAPP statute. This contention does not accurately reflect the law. In *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, the Second Appellate District reversed a trial court's denial of an anti-SLAPP motion challenging a complaint that included a cause of action alleging RICO violations. (*Id*. at pp. 470, 480.) The Second Appellate District concluded the defendants demonstrated an immunity applied to each cause of action, including the RICO claim, and, as a result, the anti-SLAPP motion should have been granted. (*Id*. at p. 479.) Consequently, *Premier* demonstrates RICO claims are subject to being stricken under the anti-SLAPP statute.

The next legal question presented is whether Madhu's complaint has stated a legally sufficient claim under RICO. (*Rusheen*, *supra*, 37 Cal.4th at p. 1056.) RICO creates a private cause of action for treble damages for "[a]ny person injured in his business or property by reason of a violation of section 1962" of title 18 of the United States Code. (18 U.S.C. § 1964(c).) To state a cause of action under section 1962 of title 18 of the United States Code, a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." (*Sedima S.P.R.L. v. Imrex Co. Inc.* (1985) 473 U.S. 479, 496, fn. omitted.) Racketeering activities, also referred to as predicate acts, are listed in section 1961(1)(B) of title 18 of the United States Code as conduct that violates specific federal statutes. The list includes the crimes of extortion, bribery, mail fraud, wire fraud, witness tampering, obstruction of justice, and many others. (18 U.S.C.

§ 1961(1)(B).) Proper pleading of a pattern of racketeering activity requires the plaintiff to allege at least two predicate acts that are interrelated by distinguishing characteristics and amount to or pose a threat of continued criminal activity. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 826.)

Conclusory allegations of two predicate acts are legally insufficient to properly plead a pattern of racketeering activity. (*Rosenthal v. Vogt* (1991) 229 Cal.App.3d 69, 77 [conclusory allegation of statutory elements of a RICO claim were insufficient]; see *Schreiber Distributing v. Serv-Well Furniture Co.* (9th Cir. 1986) 806 F.2d 1393, 1401 [allegations of mail fraud under RICO must identify the time, place, manner of each fraud, and the role of each defendant in each scheme].) Here, Madhu has not pleaded the detail necessary to show two or more predicate acts. This lack of sufficient factual allegations extends to her obstruction of justice theory, which she also contends constitutes a predicate act for purposes of RICO. Consequently, she has not shown a reasonable probability of prevailing on the RICO claim.

7. Personal Injury

Madhu's third cause of action is labeled personal injury and alleges "psychological and financial injuries related to special caregiving involved due to the *continued litigation related to* sexual abuse of the children"—injuries that were compounded by the protracted litigation. Madhu alleges "additional personal injuries as a consequence of [ex-husband's] acts of domestic violence" and "personal injuries due to [Attorneys]' litigation related misconduct."

Although Madhu has labeled this claim as a separate cause of action for personal injuries, the allegations that Attorneys engaged in "litigation related misconduct" is not a new legal theory for a separate, stand-alone cause of action recognized by California law. Instead, the claim she describes as her third cause of action is a request for damages resulting from particular types of injury. Accordingly, to show a reasonable probability

of collecting these damages, Madhu must show a reasonable probability of prevailing on a cause of action recognized by California law that allows for the recovery of these injuries. (See generally *S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 43 [litigation privilege bars intentional infliction of emotional distress claims arising out of litigation conduct].) In part IV.B., *post*, we consider whether Madhu has made such a showing.

8. Pain and Suffering

Madhu's fourth cause of action is labeled pain and suffering and alleges that, but for the misconduct of Attorneys and the other defendants, she would not have endured pain and suffering as a consequence of (1) acting in the role as a caregiver to her children after they were sexually abused, (2) relocating her home, (3) her inability to pursue her career and gainful employment, (4) her inability to complete her education, and (5) a reduced standard of living. Like the allegations she referred to as her third cause of action, the allegations in her fourth cause of action are a request for damages resulting from specific injuries—namely, the pain and suffering she endured. As California law does not recognize a stand-alone cause of action for pain and suffering, Madhu must show a reasonable probability of prevailing on a cause of action recognized by California law that allows for the recovery of pain and suffering. Therefore, whether her claim for pain and suffering was properly stricken under section 425.16 depends on whether such a cause of action survives the motions to strike—a question addressed in the next part of this opinion.

B. Probability of Prevailing and the Litigation Privilege

Madhu's remaining causes of action include fraud, malicious prosecution, abuse of process, and negligent representation. Attorneys contend these causes of action, except for the malicious prosecution claim, are barred by the litigation privilege set forth in Civil Code section 47, subdivision (b). Accordingly, we consider whether the litigation

privilege applies and, as a result, prevents Madhu from demonstrating a probability of prevailing of those causes of action. (See *Flatley, supra*, 39 Cal.4th at p. 323.)

1. Litigation Privilege—General Principles

The litigation privilege codified in Civil Code section 47, subdivision (b) provides an absolute immunity from tort liability for communications with some relation to judicial proceedings. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) Under the "some relation" test, courts have given the privilege an expansive reach. (*Id*. at pp. 1193–1194.) The main purpose of the privilege is to afford litigants the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. (*Id*. at p. 1194.) The privilege is subject to one exception—it does not apply to malicious prosecution claims. (*Ibid*.)

The litigation privilege protects only publications and communications. (*Rusheen, supra*, 37 Cal.4th at p. 1058.) Consequently, a threshold question in determining the applicability of the privilege is whether the defendant's conduct was communicative or noncommunicative. (*Ibid*.) The answer to this question turns on the gravamen of the action and "whether the injury allegedly resulted from an act that was communicative in its essential nature." (*Ibid*.) Filing pleadings and presenting false declarations to the court are examples of privileged communicative acts. (*Ibid*.) Besides pleadings and declarations, the privilege extends to testimony in court and even statements made prior to filing a lawsuit, if made in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) The privilege extends to noncommunicative acts where such acts are necessarily tied to a communicative act upon which the cause of action is based. (See *Rusheen, supra*, 37 Cal.4th at pp. 1059-1061 [privilege applied to noncommunicative act of levying property in execution of judgment where judgment allegedly procured by communicative act of submitting perjurious declarations].)

2. Fraud and Fraud on the Court

Madhu's first cause of action is labeled fraud and fraud on the court. Her complaint alleges Attorneys made false written and oral representations to the superior courts about (1) ex-husband's income and assets, (2) the number of dependent children for purposes of child support, (3) various jurisdictional issues, including whether DCSS had jurisdiction over child support matters, and (4) his and her earning capacity. The elements of a fraud cause of action are (1) a false representation, concealment or nondisclosure; (2) knowledge of falsity (i.e., scienter); (3) intent to defraud—that is, to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Under California law, fraud must be pled specifically—that is, there must be allegations of facts that show how, when, where, to whom and by what means the representations were tendered. (*Id*. at p. 645.)

Attorneys contend Madhu's fraud cause of action is barred by the litigation privilege set forth in Civil Code section 47, subdivision (b) and, therefore, she does not have a reasonable probability of prevailing on that cause of action. It is clear from the record that Madhu's claims of fraud and fraud on the court are based on communicative acts (i.e., allegedly false written and oral representations and concealment of information) with some relation to judicial proceedings. (*Rubin v. Green*, *supra*, 4 Cal.4th at p. 1193 ["some relation" test].) It follows that the litigation privilege applies to Madhu's fraud claims and, as a result, she cannot show a reasonable probability of prevailing on those claims. (See *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 769 [fraud cause of action barred by litigation privilege; reversed order denying anti-SLAPP motion].) Accordingly, the trial court properly granted the motions to strike the fraud claims under section 425.16.

3. Negligent Representation

Madhu's twelfth cause of action is labeled negligent representation/ misrepresentation and alleges "all defendants were guilty of negligent representation of

[Madhu] in the underlying family law case." Benett and Becker contend it is unclear how this cause of action would apply to them as they never represented Madhu in any judicial proceeding. Schreiber contends the cause of action is among those barred by the litigation privilege. Madhu's reply brief provides some clarification of this cause of action. Madhu contends she was harmed because Attorneys negligently misrepresented ex-husband's income earned during 2003 through 2008. Madhu's reply brief describes the statements and evidence supporting this contention. The statements related to ex-husband's income and to his being current on his child support obligation.

Based on Madhu's reply brief, it appears her twelfth cause of action was an attempt to state a negligent misrepresentation cause of action against Attorneys. It provides an alternate legal theory to Madhu's fraud claim because negligent misrepresentation can be established without proof of the defendant's intent to induce reliance on the misrepresentation. (See *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519 [comparing elements of fraud cause of action to elements of negligent misrepresentation cause of action].) The negligent misrepresentation claim is based on the same statements as the fraud claim, and those statements were made to the court and to Madhu in connection with issues related to child support. (Cf. *Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399, 426–429 [trial court correctly granted anti-SLAPP motion as to fraud-based claims—that is, false promise, negligent misrepresentation and promissory estoppel].) Consequently, the negligent misrepresentation claim—like the fraud claim—is barred by the litigation privilege contained in Civil Code section 47, subdivision (b).

4. Abuse of Process

Madhu's second cause of action refers to both malicious prosecution and abuse of process. The tort of malicious prosecution is distinct from the tort of abuse of process. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 750, 759, pp. 170, 176–177.) Here,

we consider the probability of Madhu prevailing on her abuse of process claim. Madhu alleges Attorneys and the other defendants were "guilty of abusing the process in the underlying family law matter."

Under California law, a plaintiff alleging an abuse of process must prove (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1579.) In this context, "process" means action taken pursuant to judicial authority. (*Ibid*.) Thus, "process" includes attachments, injunctions and garnishments. (5 Witkin, Cal. Procedure, *supra*, Pleading, § 759, pp. 176–177.)

Over 30 years ago, the California Supreme Court discussed *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80—a decision that held the litigation privilege in Civil Code section 47 applied to tort action for abuse of process. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1165.) The court observed that, "[s]ince *Thornton*, a considerable number of cases have followed that decision and found abuse of process actions untenable on the basis of the statutory privilege." (*Ibid*.) More recently, our Supreme Court upheld a trial court's order granting an anti-SLAPP motion directed at an abuse of process claim. (*Rusheen, supra*, 37 Cal.4th at p. 1065.) The court stated the alleged wrongful conduct was privileged and the plaintiff could not show a reasonable probability of prevailing on that claim. (*Ibid*.)

The same reasoning applies to Madhu's abuse of process claim, which is based on Attorneys' conduct in the underlying family law matter. That conduct is privileged under Civil Code section 47, subdivision (b) and, as a result, Madhu cannot show a reasonable probability of prevailing on her abuse of process cause of action. Thus, the trial court properly granted the anti-SLAPP motions as to that claim.

C. Probability of Prevailing—Malicious Prosecution

Madhu's second cause of action also alleged Attorneys and the other defendants were "involved in malicious prosecution in the underlying family law matters." The tort of malicious prosecution addresses the unjustifiable institution of judicial proceedings. (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1103.) In other words, such a cause of action asserts the defendant committed a tort by filing a lawsuit. (*Ibid*.) "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.)

Malicious prosecution claims are not barred by the litigation privilege. (See pt. IV.B.1, *ante*.) Nonetheless, malicious prosecution causes of action are subject to anti-SLAPP scrutiny. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741; *Siam v. Kizilbash, supra,* 130 Cal.App.4th at p. 1570 [cause of action for malicious prosecution is susceptible to an anti-SLAPP motion].)

Here, it is undisputed that ex-husband filed the proceeding for dissolution of marriage. Thus, the first element of the malicious prosecution cause of action is established. However, there is no evidence tending to show the dissolution proceeding was brought without probable cause. Instead, the February 25, 2008, judgment on reserved issues identifies the date the marital status ended as "2-15-06 per Status Only Judgment." Accordingly, the February 25, 2008, judgment shows ex-husband had probable cause to file the proceeding for dissolution of marriage because it shows he was successful in obtaining a judgment ending the marriage. Therefore, the evidence in the record defeats, as a matter of law, Madhu's attempts to establish the lack of probable cause, the second element of a malicious prosecution claim. Accordingly, the trial court properly granted the anti-SLAPP motions as to that claim.

Based on the foregoing conclusion, we need not reach the legal question presented by Attorneys' contention that Madhu's malicious prosecution claim is barred by the principles adopted in *Bidna v. Rosen* (1993) 19 Cal.App.4th 27. In *Bidna*, the Fourth Appellate District concluded that "no malicious prosecution action may arise out of unsuccessful family law motions or OSC's." (*Id*. at p. 37; see *Nicholson v. Fazeli* (2003) 113 Cal.App.4th 1091, 1096 [a cross-complaint that originates in a dissolution action may form the basis for a malicious prosecution action]; *Begier v. Strom* (1996) 46 Cal.App.4th 877, 886–888 [husband could not maintain a malicious prosecution action based on wife's false allegations of molestation in the dissolution action].)

V. Procedural Issues

A. Timeliness of Schreiber's Service

1. Madhu's Contentions

Schreiber filed her anti-SLAPP motion on Friday, April 17, 2015. The proof of service states the motion was served on April 17, 2015, by overnight delivery using an overnight carrier service. Madhu's opposition to Schreiber's motion stated she received the motion by overnight mail on April 20, 2015, which was a Monday. On appeal, Madhu states she was served on April 21, 2015, which she contends was 15 court days before the May 13, 2015, hearing date. Madhu argues the service was defective because it violated Code of Civil Procedure section 1005, subdivision (b) and California Rules of Court, rule 3.1300(a).

2. Service Requirements

California Rules of Court, rule 3.1300(a) states that "[u]nless otherwise ordered or specifically provided by law, all moving and supporting papers must be served and filed in accordance with Code of Civil Procedure section 1005." Pursuant to Code of Civil Procedure section 1005, subdivision (b), civil motions and support papers generally must be "served and filed at least 16 court days before the hearing." When overnight delivery

is used, "the required 16-day period of notice before the hearing shall be increased by two calendar days." (Code Civ. Proc., § 1005, subd. (b).)

3. Timeliness of Service

By our count, 16 court days before the hearing date of Wednesday, May 13, 2015, was Tuesday, April 21, 2015. As service of Schreiber's motion was by overnight delivery, two more days must be added to the period. Friday, April 17, 2015, was 18 court days before the May 13, 2015, hearing date. Consequently, Schreiber's service of her motion by overnight delivery on April 17, 2015, complies with the 18-day period required by Code of Civil Procedure section 1005, subdivision (b). Therefore, service was timely. Accordingly, the trial court did not err in considering Schreiber's anti-SLAPP motion.

B. Late-filed Oppositions

The trial court's order granting the anti-SLAPP motions stated: "The Court has not considered [Madhu]'s late-filed opposition to the two special motions to strike. (Cal. Rules of Court, rule 3.1300(d).)" Madhu contends the court was required by subdivision (b)(2) of section 425.16 to take her oppositions into consideration and, as a result, did not have the authority to exclude her filings.

1. General Principles

The time constraints for filing papers opposing a motion are addressed in Code of Civil Procedure section 1005, subdivision (b), which provides in part: "All papers opposing a motion … shall be filed with the court and a copy served on each party at least nine court days … before the hearing." This provision also authorizes the court to prescribe a shorter time.

California Rules of Court, rule 3.1300(d) addresses the treatment of late-filed papers: "No paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper,

the minutes or order must so indicate." Trial courts have "broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.) A trial court's refusal to consider late-filed papers is reviewed for an abuse of discretion. (*Ibid*.) In *Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 33, the court stated it is an abuse of discretion for the trial court to disregard late-filed papers if excusable neglect is shown under the factors relevant to granting relief under Code of Civil Procedure section 473.

An abuse of discretion results in reversible error only when the ruling in question results in the denial of a fair hearing or otherwise prejudices a party. (See *Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527.) The appellant has the burden of demonstrating prejudice. (*Ibid*.; see *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 566 [to establish reversible error, appellant must show both an abuse of discretion and a miscarriage of justice, i.e., prejudice].)

2. Prejudice

Here, Madhu has not established the trial court's refusal to consider her opposition papers resulted in prejudice. One factor weighing against a finding of prejudice is that she appeared at the hearing and presented arguments to the court. More significantly, her oppositions, if they had been considered by the court, do not show a reasonable likelihood that Madhu would have obtained a more favorable result. The activities that were the basis of her complaint were clearly protected activities for purposes of section 425.16. Some of her causes of action are not recognized under California law. The opposition papers could not cure this defect. Most of Madhu's other causes of action were barred by the litigation privilege. The opposition papers did not demonstrate that the causes of action for fraud, abuse of process, and negligent misrepresentation did not have "some relation" to the child support proceedings. (*Rubin v. Green*, *supra*, 4 Cal.4th

at p. 1193.) As to the only cognizable cause of action to which the litigation privilege did not extend—namely, the malicious prosecution cause of action—Madhu's opposition papers did not make a prima facie showing that the marriage dissolution proceeding was filed without probable cause.

In summary, the consideration of Madhu's opposition papers would not have changed the trial court's decision to grant the anti-SLAPP motions. Therefore, the trial court's refusal to consider Madhu's opposition papers was not prejudicial and cannot be deemed reversible error.

C. Extension of Time to Respond to Schreiber's Motion

Madhu contends the trial court improperly refused her request for an extension of time to file a response to Schreiber's anti-SLAPP motion. Madhu argues she did not have sufficient time to prepare all of the papers needed to respond to the demurrers and other pending matters and prepare an opposition to Schreiber's anti-SLAPP motion.

Again, Madhu has not established a *prejudicial* abuse of discretion. It appears from the allegations of the complaint that the causes of action were based on protected activities for purposes of section 425.16 and that most of the other causes of action were barred by the litigation privilege. Nothing Madhu might have included in an opposition would have changed the nature of her complaint or the principles of law defining protected activity and the litigation privilege. Consequently, Madhu did not lose the anti-SLAPP motions because she lacked the time to respond. Instead, she lost because she pursued causes of action not recognized by California law, based other causes of action on activity subject to the litigation privilege, and could not have cured the defects in her malicious prosecution claim if given more time. Consequently, we conclude the trial court did not commit reversible error when it did not allow Madhu additional time to file an opposition to Schreiber's anti-SLAPP motion.

VI. First Amended Complaint

A. Contentions of the Parties

Four of the issues on appeal listed in Madhu's opening brief relate to the FAC. Madhu contends that, pursuant to Code of Civil Procedure section 472, she had a right to file the FAC any time before an answer was filed and the filing of Attorneys' anti-SLAPP motions did not divest her of the right. In a related argument, Madhu contends the FAC was filed before Schreiber's anti-SLAPP motion and, therefore, the anti-SLAPP motion was moot. Madhu also contends the FAC alleges Attorneys are guilty of illegal acts and such acts are not protected by the federal or state Constitutions or section 425.16 and, therefore, the anti-SLAPP motions lack merit. In addition, Madhu contends that, "at the very least, the Court was required to provide declarative and injunctive relief as sought in my FAC."

Attorneys contend the trial court's denial of leave to file the FAC is subject to appellate review under the abuse of discretion standard. They argue the trial court did not abuse its discretion in denying leave to amend because the request failed to comply with California Rules of Court, rule 3.1324, which required the request to be accompanied by a declaration containing information expressly stated in the rule. Benett and Becker also contend plaintiff lacks the right to file an amended pleading as a matter of course because they filed their anti-SLAPP motion *before* plaintiff filed her request.

B. Denial of Leave to Amend Was Not an Abuse of Discretion

1. Abuse of Discretion Standard

Pursuant to subdivision (a)(1) of section 473 of the Code of Civil Procedure, a trial court may, "in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading." The statute's use of "may" and "in its discretion" means a trial court's decision to grant or deny leave to amend is reviewed on appeal under the abuse of discretion standard. Generally, an abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the trial

court's decision exceeds the bounds of reason and results in prejudice—that is, a miscarriage of justice. (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1077.)

In an appeal challenging a trial court's *denial* of leave to amend the complaint, the Second Appellate District stated that the trial court has wide discretion in allowing the amendment of any pleading and, as a matter of policy, the ruling of the trial court in such matters will be upheld unless a manifest abuse of discretion is shown. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) In comparison, the California Supreme Court has recognized a general rule of liberal allowance of amendments. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939.) More recently, the Supreme Court referenced "the rule that leave to amend a pleading should be liberally granted so long as there is no timeliness problem under a statute of limitations or prejudice to the opposing party." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 240.)

Motions to amend a pleading before trial are addressed by California Rules of Court, rule 3.1324. Subdivision (b) of that rule provides: "A separate declaration must accompany the motion [to amend] and must specify: [¶] (1) The effect of the amendment; [¶] (2) Why the amendment is necessary and proper; [¶] (3) When the facts giving rise to the amended allegations were discovered; and [¶] (4) The reasons why the request for amendment was not made earlier."

2. Lack of Supporting Declaration

Here, the trial court denied the motion for leave to amend because Madhu failed to accompany her motion with the declaration required by California Rules of Court, rule 3.1324. Few published cases have addressed whether the failure to comply with California Rules of Court, rule 3.1324 is an adequate basis for denying a motion for leave to amend.

In *Hataishi v. First American Home Buyers Protection Corp.* (2014) 223 Cal.App.4th 1454, the plaintiff argued the trial court abused its discretion by refusing to grant leave to amend. (*Id*. at p. 1469.) The plaintiff did not file a formal motion to amend and did not make the evidentiary showing required by California Rules of Court, rule 3.1324. (*Ibid*.) As to granting the informal request for leave to amend, the trial court expressed concern that due process required the defendant be given an opportunity to respond to a written motion. (*Ibid*.) Addressing this concern, the plaintiff agreed to make a formal motion, but did not follow through. (*Ibid*.) Under the circumstances presented, the Second Appellate District concluded there was "no abuse of discretion in the trial court requiring Plaintiff to bring a motion, compliant with the Rules of Court, to which [the defendant] would have an opportunity to respond—particularly in light of Plaintiff's express agreement to do so." (*Ibid*.) Thus, *Hataishi* is an example of a case where the failure to comply with California Rules of Court, rule 3.1324 was regarded, at least in part, as justifying a denial of leave to amend.

Here, we conclude the trial court did not abuse its discretion in denying the motion for leave to amend based on the failure to file the declaration required by California Rules of Court, rule 3.1324(b). First, the rule uses mandatory language. Madhu did not comply with the mandatory language. Generally, enforcing a rule as written does not exceed the bounds of reason. As a result, Madhu must establish other circumstances that justify a deviation from the mandatory rule.

Second, the general rule for liberally allowing amendments does not necessarily govern the circumstances of this case. The public policy underlying that general rule must be balanced against the public policy underlying section 425.16, which favors the speedy resolution of SLAPP actions. (See *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073–1074.) Thus, the policy of liberal amendment does not provide a basis for concluding the trial court exceeded the bounds of reason in denying Madhu's

request for leave to amend. It was reasonable for the trial court to conclude the policy governing the more specific situation should be given more weight.

Third, Madhu's points and authorities in support of her motion to amend stated: "[Madhu] has not made any significant change[s] to her complaint. She has simply added more factual and legal details to the complaint. [¶] To [Madhu]'s knowledge, there are no substantive differences between the first and the second amended complaint." This *general* description of the FAC as having no substantive differences suggests the denial of leave to file the FAC was not prejudicial to Madhu. Next, we consider whether the *specific* details added by the FAC stated claims that would have survived the motions to strike.

One way the FAC beefs up Madhu's claims is by containing more details about the illegality of Attorneys' conduct and by referencing additional criminal statutes that Madhu alleges were violated. These additions do not provide a basis for concluding Attorneys' conduct falls within the illegality exception set forth in *Flatley* and, therefore, is not protected activity under section 425.16. There has been no concession of illegality by Attorneys and Madhu's evidence does not conclusively establish the illegality of Attorneys' conduct. (*Flatley*, *supra*, 39 Cal.4th at p. 316.) For example, Madhu's claim that Benett and Becker fraudulently secured sanctions of $17,000 against her and, therefore, are illegally in possession of her $17,000 is not conclusively established by the evidence.

Madhu also appears to argue the denial of leave to amend resulted in prejudice to her because the FAC contained allegations that Schreiber's *physical acts*, rather than communicative acts, constituted a tort that would have survived the anti-SLAPP motion. Madhu's reply brief asserts Schreiber "appeared at my home, threatened my children, trespassed, stalked and intimidated me and my children." Paragraphs Nos. 202 through 206 contain the allegations relating to Madhu's claim of threats and stalking. Those paragraphs contained the following allegations. Around the last week of June 2011, ex-

husband asked permission to visit one of the minor children and Madhu agreed. Ex-husband and Schreiber arrived at Madhu's door a few hours later, were met by the minor child at the door, and Schreiber "threatened, harassed, intimidated, and bullied the child, and attempted to force him to sit in [ex-husband's] car, attempting to abduct him." The child repeatedly asked them to stop and go away and eventually slammed the door, called Madhu, and hid in the closet in his room. Madhu asked ex-husband and Schreiber to leave, and they refused.[10] Madhu called her attorney, who talked with Schreiber and asked her to leave. Schreiber informed Madhu's attorney that she was not going to leave the premises and mockingly asked him what he could do about it. Following the advice of her attorney, Madhu locked herself in the house. Ex-husband and Schreiber "stalked the family for around an hour and then left." Madhu reported the matter to the State Bar and stated she would provide the response from the State Bar as an exhibit at trial. We note that at the time of the incident, Madhu had yet to receive sole legal and physical custody of the minor children.

The alleged incident involves both communicative acts and physical acts that were noncommunicative. The communicative acts constitute the majority of the behavior alleged. There are no allegations the child or Madhu were touched by ex-husband or Schreiber and, therefore, the allegation that Schreiber "threatened, harassed, intimidated, and bullied the child and attempted to force him to sit in [ex-husband's] car, attempting to abduct him" relates to verbal, communicative behavior. The only physical acts alleged relate to being on the premises and remaining there after being asked to leave by the child, Madhu, and Madhu's attorney. The communicative acts were related to a subject of the litigation—that is, child visitation. Consequently, the litigation privilege would apply to the communicative acts.

---

[10]To the extent that ex-husband and Schreiber had implied permission to enter property occupied by Madhu, that permission was revoked when she asked them to leave. (See 75 Am.Jur.2d (2018) Trespass, § 80 [revocation of consent].)

The physical acts of remaining on the property after being asked to leave are not, in themselves, communicative. For purposes of this appeal, we assume Madhu's allegations are sufficient to state a cause of action for trespass and the physical acts constituting the alleged trespass are not protected activity under section 425.16. (See generally CACI No. 2000 [essential factual elements of trespass claim].) Consequently, we address whether Madhu was prejudiced by the denial of leave to amend, which precluded her from pursuing the trespass claim. Our evaluation of prejudice includes considering whether the trespass claim was timely under the applicable statute of limitations. Code of Civil Procedure section 338, subdivision (b) states an "action for trespass upon or injury to real property" must be commenced within three years. The alleged acts constituting the trespass occurred around June 2011. Madhu filed this lawsuit on February 2, 2015, which is more than three and a half years after the trespass occurred. Consequently, a trespass claim against Schreiber would be time barred. It follows that Madhu was not prejudiced by the denial of leave to amend to pursue such a claim.

3. Amending as a Matter of Right

Madhu contends Code of Civil Procedure section 472 gave her the right to file the FAC any time before an answer was filed. Assuming for purposes of argument that this right applied to the FAC, Madhu did not seek to invoke it. Instead of filing the FAC in accordance with the claimed right under Code of Civil Procedure section 472, she filed a motion requesting leave to file her proposed FAC based on Code of Civil Procedure section 473, subdivision (a). Her moving papers did not raise this legal theory, and it was not an abuse of discretion for the trial court to omit considering a legal theory not raised in the motion. More significantly, as noted in the prior section, Madhu has not established the denial of leave to file the FAC was prejudicial—that is, the FAC

contained causes of action that would have withstood the challenges in the anti-SLAPP motions.

4. Mootness

An amended complaint supersedes the original complaint and, accordingly, the original complaint ceases to have any effect either as a pleading or as a basis for judgment. (*JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477.) Under this principle, the *filing* of an amended complaint moots a motion directed at the prior complaint. (*Ibid*.) "So too does an amended complaint render moot an anti-SLAPP motion directed to a prior complaint, with the following caveat: A plaintiff … may not seek to subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint … in response to the motion." (*Id*. at pp. 477–478.)

Here, the FAC was never "filed" in the sense that it became the operative pleading and, as a result, superseded the original complaint. The attachment of a copy of the proposed FAC as an exhibit to the points and authorities in support of the motion for leave to amend does not constitute filing the FAC in a manner that renders it the operative pleading. Furthermore, Madhu's contention that the FAC "should have been *deemed* filed before both" anti-SLAPP motions is not supported by any authority for deeming a pleading filed. (Italics added.) Consequently, we reject Madhu's contention that the FAC was filed (or should be deemed filed) before Attorneys' anti-SLAPP motions and, therefore, the motions were moot. Instead, the original complaint was the operative pleading from the date it was filed until the trial court ruled on the pending anti-SLAPP motions. Therefore, the motions to strike under section 425.16 properly challenged the original complaint and were not rendered moot by Madhu's request for leave to file the FAC.

5. Declaratory and Injunctive Relief

Madhu's opening brief contends that, "at the very least, the Court was required to provide declarative and injunctive relief as sought in my FAC." It also contends that the trial court, despite determining some of the causes of action were barred, "was—in the furtherance of justice—required to allow me to proceed with my complaint on other Causes of Action, especially criminal allegations, and to provide declarative and injunctive relief as sought in FAC." Similarly, Madhu's reply brief contends the trial court was mandated to allow the matter to proceed by providing declarative and injunctive relief.

We reject these contentions and arguments about declaratory and injunctive relief. First, they are not supported by authority stating such claims for relief are exempt from anti-SLAPP motions. Second, Madhu has not presented arguments convincing us to adopt a new principle of law exempting claims for declaratory and injunctive relief from being struck under the anti-SLAPP statute. In our view, the statutory purpose would be undermined if such an exemption were recognized. Third, Madhu's argument that these claims should proceed because the anti-SLAPP statute does not protect illegal activity does not justify partially denying the anti-SLAPP motions. Madhu has not satisfied the test for illegality established by our Supreme Court in *Flatley*. That test is met only where "the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence." (*Flatley*, *supra*, 39 Cal.4th at p. 316.) Here, Attorneys have not conceded their actions were illegal and the asserted illegality is not conclusively shown by the evidence. Accordingly, we conclude Madhu's claims for injunctive or declaratory relief do not survive Attorneys' anti-SLAPP motions.

VII. Motion for Relief

A. Background

On August 16, 2017, Madhu filed a motion for relief in this court. Madhu requested this court to (1) "Consider my Appeal De Novo"; (2) "Grant Permission for

Incorporation of Material Presented in All Records and Pleadings"; (3) "Provide Special Consideration to my Pro Per Status"; and (4) "Provide Special Consideration to Appeal as a precedent affecting various Classes of Plaintiffs and Defendants." Madhu also requested that, in the event this court denied her motion, "it provide a reason/basis for its refusal in order to preserve the records for judicial review."

On August 24, 2017, this court filed on order stating the motion was deferred pending consideration of the appeal on its merits.

B. Denial of the Motion

1. Madhu's Pro Se Status

First, we consider Madhu's request that the court allow accommodations in consideration of her position as a pro se litigant. Madhu argues courts are required to protect pro se litigants from the consequences of technical errors and to use common sense in construing their papers.

Self-representing litigants, as well as the pleadings and motions they file in the trial court, are subject to the standards generally applied by California courts in civil litigation. (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284–1285 [self-representing litigants are not exempt from statutes or court rules governing procedure].) The same approach applies in the Courts of Appeal. We treat self-representing litigants like any other party and, therefore, they are subject to the same rules of appellate procedure as parties represented by an attorney. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247 [appellant representing self on appeal must follow correct rules of procedure].)

The foregoing principles reflect the decision of the California Supreme Court to address the difficulties of self-representing litigants through self-help centers, rather than allowing such litigants to proceed under relaxed rules of procedure and evidence. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 [difficulties of providing special

treatment to parties who represent themselves]; Cal. Rules of Court, rule 10.960(b) ["access to justice for self-represented litigants is a priority for California courts"].) The stated purpose of the self-help centers is to improve the delivery of justice to the public by facilitating the timely and cost-effective processing of cases involving self-represented litigants. (Cal. Rules of Court, rule 10.960(b).) "The information and education provided by court self-help centers must be neutral and unbiased, and services must be available to all sides of a case." (*Id*., at rule 10.960(d).)

Based on the foregoing, Madhu's request for accommodations based on her status as a pro se litigant is denied.

2. De Novo Review

This court has described the standard of review applicable to the order granting the anti-SLAPP motion as de novo. (See pt. II.D, *ante*.) A motion requesting this court to conduct its review in accordance with the applicable standard of appellate review is unnecessary and, moreover, wastes the effort of the moving party and court personnel who process the request. Accordingly, that portion of Madhu's motion for relief is denied as superfluous.

3. Special Consideration as Precedent

The part of Madhu's motion requesting this court "Provide Special Consideration to Appeal as a precedent affecting various Classes of Plaintiffs and Defendants" is not a coherent request for relief. This appeal has been considered based on the arguments and record presented. Neither side has received "special consideration" based on the potential of this case to create precedent. Accordingly, that portion of the motion for relief is denied.

4. Incorporation of Material

Madhu's request relating to the incorporation of material presented in the record is a response to Benett and Becker's argument that Madhu failed to demonstrate a

probability of prevailing on a cause of action because her opening brief relied upon impermissible references by incorporation to the trial court record. In particular, Benett and Becker argue Madhu cannot rely on her FAC or her late-filed opposition to their anti-SLAPP motion.

Our examination of the second step of the anti-SLAPP inquiry, which considers whether Madhu has shown a reasonable probability of prevailing on one or more of her claims, was not based on the technical argument raised by Benett and Becker about references to the record. Indeed, we considered the materials in determining whether Madhu had established prejudice resulting from the trial court's denial of her motion requesting leave to file the FAC and its refusal to consider her opposition.

The portion of the motion for relief related to the incorporation of material presented in the trial court is denied because such relief is not a necessary requisite to our review of this appeal. We have reviewed the materials presented in accordance with the general rules governing appellate procedure. Thus, Madhu's novel request was unnecessary.

DISPOSITION

The judgments entered after the trial court issued orders granting the special motions to strike are affirmed. Plaintiff's August 16, 2017, motion for relief is denied. Plaintiff's December 19, 2018, request for judicial notice is denied. Defendants shall recover their costs on appeal.

_____

PEÑA, J.

WE CONCUR:

_____

POOCHIGIAN, Acting P.J.

_____

SMITH, J.